ADR Bulletin
ADR Bulletin

Volume 1 | Number 7 Article 1

1-1-1999

Privatising justice in Australia?

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The ADR Bulletin

The monthly newsletter on dispute resolution

contents

VOLUME 1 NUMBER 7
DECEMBER/JANUARY 1999

Editorial

Privatising justice in Australia?

Michael Robertson

This issue of the ADR Bulletin looks at private judging and the possibility that private courts could be established in Australia. The materials published here are intended to draw attention to some of the important issues surrounding two basic questions:

1. Is civil justice gradually becoming privatised in Australia?

2. Should there be *more* private sector involvement in the management of civil disputes?

There is an initial difficulty facing anyone who is interested in this area. It is not always clear what phrases like 'private judging' and 'private courts' actually mean. Some of the following questions illustrate this terminological difficulty:

- Is private judging similar to arbitration? If not, what are the main differences?
- Is case appraisal a type of private judging?
- Is private judging in Australia (assuming that it is appropriate to speak of such a thing) the same as private judging as the term is used in the US?
- Who are private judges? Do they have to be 'real' judges, retired or for some other reason no longer on the bench?
- Does private judging only take place in private courts? If not, does this mean that you can have private judging without private courts? (And can you have private courts without private judges? If so, who does the judging in private courts?)

The article by Hedy Meggiorin (beginning on p 92) notes that it *is* possible to speak of private judging in Australia. Not only has private decision-making 'infiltrated' Australian ADR processes, but (some) retired judges are routinely providing their services to Australian litigants. However, as the author sees it, none of this can yet be compared to the scale of commercialisation of private judging that has occurred in the US. Some of the 'rent-a-judge' developments in the US are noted in her article, which seeks mainly to draw attention to the 'pitfalls' of privatised justice. Her conclusion is that Australia must avoid the US road, and she calls for government intervention and regulation in the growing private judging industry. In her view a failure to act will result in substantial impoverishment to the public justice system.

Lillian Corbin (p 96) provides a snapshot of four different private adjudication services on the American market. These should give readers some impressions of the nature of the market in dispute services in a commercialised private judging context.

The remaining piece is entitled 'Licensed private 'courts' in parallel with public civil courts' (p 99). This is an extract from a recent consultation paper put out by the Law Reform Commission of Western Australia, and is part of a wider review of the civil and criminal justice system in that State. The document is significant because it looks very pointedly at the possibility of introducing private courts of limited jurisdiction in WA, following the introduction of proposed 'pilot ➢

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➢ projects and experiments'.

It is notable that the question of privatised civil justice was raised by the Australian Law Reform Commission (ALRC) in an Issues Paper (IP 20, April 1997). There, the ALRC at least raised the question — albeit mildly — as to whether 'a public, state supported, litigation system will continue to operate in the future' (at 129). It went on to pose three questions which bear repeating here:

1. Should we make constitutional and legislative provision to produce a civil justice system that is largely private with the exercise of federal judicial power by federal courts only being available as a last resort in specific circumstances?
2. What would be the effect if governments concentrated on providing a regulatory framework for privatised or franchised justice with competition being provided by the exercise of legislative and executive power and with the exercise of federal judicial power limited to review, enforcement and appeal?
3. If it is desirable to foster private adjudicatory processes, how should this be done?

We do not yet know what comments and submissions the ALRC received in response to these questions. A report, due out later this year, will include reference to these questions and the public's submissions. What we do know is that the later Issues Paper 25 (of June 1998, which dealt with the role of ADR in federal dispute resolution) appears not to embrace, or to ventilate further, the issues of a 'largely private' civil justice system, in spite of ample opportunity to do so in the paper.

Whatever the present attitude of the ALRC, the law reform body in WA is far from diffident on the issue. For example, the consultation paper from which this Bulletin's piece is extracted has annexed to it a very substantial appendix compiled by Stephen Parker entitled 'A case for private courts'. This separate report was presumably commissioned by the WA Law Reform Commission itself.

Elsewhere in its consultation paper the WA Law Reform Commission seems to take the bull by the horns in its section headed 'A 2020 vision of civil courts'. The paper states that 'civil justice will never be given a sufficiently high political priority to allocate significantly larger sums of money to it. Much of the new revenue will come from the users of the courts' (at 9).

Stating a need to 'rid ourselves of certain preconceptions and articulate some clear principles if we are to move forward' the paper goes on to state that 'the duty to subsidise civil justice could be seen as limited to the extent that the public interest is at stake in litigation generally.' (at 10).

Two propositions are then put forward. The first is that the level of contribution by court users should approximate 'the element of private gain in litigation'. The second, of significance here, is that 'non-state justice providers, the decisions of which are enforced by the State' are a justifiable development.

This bold proposition is reached by making an important distinction between (1) the state monopoly over the *provision of justice* and (2) the state monopoly over the imposition of *legitimate force*. According to the Commission, the monopoly over legitimate force must be retained, but not the monopoly over justice provision.

It is this reasoning that leads the Commission to make the significant proposal that 'a feasibility study of parallel private civil courts should be commissioned and, if sufficiently encouraging, a pilot project should be devised' (at 10 and 20).

Reverting to the question of terminology, Meggiorin relies upon a NADRAC definition of private judging to describe the process in which a neutral third party ➢

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➢ (for which read former member of the judiciary) determines a dispute at the request of the parties in dispute. This is a broad definition and, but for the reference to former judges, it could include any dispute resolution process that involves someone who is not a sitting judge, such as an arbitrator, case appraiser (or possibly even a mediator).

It is interesting to note that contemporary American authors Chernick, Bendix and Barnett provide a significantly different definition — in some important respects — of private judging in the US.[1] They say that (italics added):

> 'Private judging' ... refers to *a court's reference for trial* of issues of fact or law to a presiding official selected by the parties. It is voluntary and binding, and outcomes are enforceable and subject to review in the trial court, an appellate court, or both. The decision-maker generally is a former judge or a lawyer. Private judging is unique among binding alternatives to the court system in preserving the *opportunity to appeal* the outcome in the public court system.[2]

In a review of the sometimes extensive system of private judging in the US, the authors go on to conclude that nothing in these developments undermines efforts to improve the defects in the public court system. In other words, the message seems to be 'don't blame ongoing problems in the court system on private judging developments in the private system'.

Another quotation from the Chernick, Bendix and Barrett report, which comes down firmly in favour of private judging, seems to summarise an important point of view in the range of arguments for and against privatised justice:

> Alternative dispute resolution in general, and private judging in particular, represent a potentially significant alternative to the adversarial system. They provide an array of cost-effective and timely procedures that avoid protracted court battles; they offer litigants the opportunity to achieve mutually satisfactory outcomes using procedures that they devise themselves to suit the particular case, and that are almost always perceived as fair. Of course, since the parties choose the private judge and control the kind of procedures that will apply in the hearing, it is unsurprising that they are more likely to perceive the outcome as fair, and indeed the study [by the Institute for Social Analysis] concluded that litigants had 'extremely high perceptions of fairness and satisfaction with private judging on both sides of the case'. Invariably, private judge proceedings are more civil and efficient than court trials. That ADR has been perceived even by those in the public system to be advantageous is demonstrated by the embrace of many of its principles by our courts, which have with increasing frequency incorporated ADR-type proceedings into traditional court processes. Mediation and court-ordered (judicial) arbitration are but two examples of well-known ADR techniques that are now regular features of the public court system.[3]

On the basis of the materials presented in this issue of the Bulletin, tentative responses can be offered to the questions posed at the beginning of this editorial:

- Private judging, in a broad sense, includes arbitration.[4] However, if one relies on the NADRAC definition (quoted in the piece by Meggiorin), private judging is distinguishable at least because, unlike arbitration, it must involve someone who has judicial experience. But if the narrower definition by the American authors is used, private judging differs from arbitration in that the former (1) requires a reference for trial by a court and (2) the decision is appealable in the court system.
- Case appraisal could also be seen to be a species of private judging, assuming that private judging is used in a loose sense. However, the evaluative feature of case appraisal would seem to set it apart from the determinative nature of 'judging', implicit if not explicit in the various definitions of private judging. It is questionable whether there is much utility in referring to case appraisal as a form of private judging.
- The notion of private judging in the Australian sense (again, the NADRAC definition), does seem to differ from the meaning given to the term in the US. There, assuming the usage relied upon above, the term means court-approved trial a by court-approved neutral whose decision is appealable back into the court system.
- Typically, private judges are persons with judicial experience. In Australia it would seem that private judging (excluding commercial arbitration and case appraisal), although uncommon, involves retired members of the Australian judiciary. It remains to be seen whether the private judging movement develops here to the point where litigants can request courts to appoint other lawyers to try cases privately. It is possible in parts of the US.
- Private judging, whatever definition is used, does not have to take place in private courts. In fact, private judging in the senses used in this Bulletin, appears not to take place in private courts at all. It may therefore be helpful to keep the notion of private courts (in the sense contemplated in the WA proposals) separate from private judging. There is of course common ground between the two concepts: both are part of the phenomenon of privatised justice. Further, it seems that one could have private courts *without* private judges. Under the WA draft proposals, private organisations that are 'licensed' to dispense civil justice could be staffed by 'adjudicating officers' — legal practitioners with specified practice experience, but not necessarily former members of the bench. ❖

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Endnotes

1. R Chernick, H I Bendix and R C Barrett 'Private Judging: Privatizing Civil Justice' National Legal Center for the Public Interest, published at http://www.nlcpi.org/books/briefly7/ddtext.html at 3.
2. Ibid at 1.
3. Ibid at 26.
4. This word is also susceptible to some variation in meaning. It is used here in the sense of commercial arbitration, as provided for in the various (largely uniform) Commercial Arbitration Acts in most Australian States.